

From Dominance to Détente in the Face of Climate Change: Agreements Beyond Boundaries with Indigenous Nations

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Abstract—This paper explores frameworks for expanding agreements between indigenous peoples, governments, and partner organizations to conserve and restore wild and protected areas impacted by climate change. From the Indigenous Peoples Treaty Project to the expansion of Federal nation to nation consultation with Tribes in the United States, new initiatives create models for reducing conflict in relationships formerly based on dominance. Impacts of climate change already “in the pipeline” call for shared participatory processes where traditional ecological knowledge and community participation form key components. Responses to climate change like natural or assisted migrations or reallocation of natural water flows illustrate the proclivity of climate change to break through borders. Impacts to indigenous communities, now an international issue, add to the need for careful examination of intergovernmental and international agreements. Water, above all else, suggests that cooperation and détente must replace domination to achieve trans-boundary goals protecting wildlands, biological corridors, waterways, and people. Détente is a balancing bar for traditional ecological knowledge, rights, and relationships that expand the reach of action to resolve problems. Innovation in bilateral and multilateral relationships harmonizes conflicts by building the foundations for agreements. Consultation between indigenous peoples, governments, and organizations protecting wildlands creates harmonizing mechanisms for inclusive multilateral relations and strategic planning. Rebalancing power relationships and combining authorities, vital to combat fragmented policy, ensures the survival of wildlands and indigenous peoples.

Introduction

As climate change progresses, consultation with indigenous peoples provides a critical tool for shaping agreements that protect natural and cultural heritage. For indigenous peoples, cultural survival is at stake. For wildland managers, the

ability to maintain a preservation and conservation mission is at risk. Climate change as a phenomenon is ridiculously complex, stretching across the arenas of scientific inquiry, policy-making, political boundaries, and economics. Stronger relationships between indigenous peoples and agencies can set forth a defense against a muddling, fragmented approach to a common threat. This is something that we can all accomplish.

Indigenous peoples need support. In the United States, Tribes govern between 4 and 5% of the landbase, but receive only about 1% of the monies for environmental protection and enhancement. While 85% of the Alaskan Native villages are now at risk due to flooding and erosion, and Northwest Tribes face a 50% loss in habitat for salmon, most can't access Federal funding due to prohibitive funding criteria (NCAI 2009). A fair and level playing field contributes to successful consultation and participatory decision-making. The National Congress of American Indians policy statement on global warming requests that specific attention should be directed to activities that protect traditional practices that are directly threatened by the consequences of a rapidly changing climate (NCAI 2009). They also evince concerns about programs like REDD that are moving ahead without specific protocols and processes to respect the rights and sovereignty of indigenous peoples. Actions to protect wild lands that include sacred areas and the sources of traditional ecological knowledge are critical to indigenous peoples to sustain traditional practices.

In his meeting with representatives of the 564 recognized Tribal Nations in the United States, President Obama promised that the Tribes would not be forgotten. As he prepared to sign, the President stated: “The memo I will sign directs every cabinet agency to give me a detailed plan of how to fully implement the Executive Order on Consultation and Collaboration and how we are going to improve tribal consultation” (President Obama 2009). He further stated that “we have a lot to learn from your nations to create the kind of sustainability we need” (President Obama 2009).

The model of consultation as an agreement-making process emerged after the period of self-determination and self-governance in the 1970s in the United States. Earlier, treaty-making as a consent system settled boundary issues, but it left a level of persistent conflict for implementing environmental policies. Assertions of Federal dominance prolonged tension and conflict in intergovernmental relations. Consultation developed as a framework for reducing conflict and enlarging the area of shared interests during a time when most government land management agencies

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Watson, Alan; Murrieta-Saldivar, Joaquin; McBride, Brooke, comps. 2011. Science and stewardship to protect and sustain wilderness values: Ninth World Wilderness Congress symposium; November 6-13, 2009; Meridá, Yucatán, Mexico. Proceedings RMRS-P-64. Fort Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 225 p.

moved to policies of ecosystem management. At the same time, Tribes moved to self-determination policies and consultation expanded into participatory decision-making. The potential impacts of climate change suggest that consultation policies and frameworks further strengthen to face unpredictable events and serious impacts on natural and cultural resources. Today, boundaries melt nearly as quickly as the Arctic ice. Animals and plants cross boundaries or reach barriers, land masses and coastlines change, and access to traditional resources becomes difficult. Getting it wrong by getting stuck in conflict is not an option. Increased understanding of the legal, social, cultural, and political context of consultation and agreements makes the case for a survival toolkit. “We are entering an era where we are looking out for each other” (Terry Williams, Puyallup Tribe). Détente, the recognition of the legitimate role of multiple authorities and partnerships, replaces dominance when the endgame is to mitigate the impacts of climate change.

Tribes hold water rights and lands, so they come to the table with resources of great importance to wildlands. They move beyond reactive positions and take the initiative to ask the questions, call meetings, and define strategies. Tribes have an equal stake in the process and the outcome, and so “should play an equal part in deciding the shape of the system” (DeLoria 1995 p.10). The rebalancing of the consultation system is nowhere more evident than in Obama’s change, echoed by Interior Secretary Salazar, from government-to-government language to that of nation-to-nation for consultation. Last week, Obama held meetings with tribal leaders on climate change, promising combined efforts from Federal agencies and ordering reports on progress from the agencies within 90 days. He has a clear and present understanding of the impacts of climate change on Tribes.

Steps in Consultation

Identification of Authority

The first step in an effective consultation process is for all parties to identify themselves and their authority, to be in a formal consultation process. This step can be taken through a memorandum of understanding or memorandum of agreement, as a means of establishing trust and credibility through protocols. These agreements may need flexible provisions to accommodate multilateral negotiations in addition to bilateral negotiations. Increasingly, tribes are coming together in multilateral entities like the Northwest Indian Fish Commission or the National Congress of American Indians (NCAI). The NCAI has suggested in its policy statement on global warming that in some places, in the absence of the rule of law, more must be done to assure title or meaningful rights to indigenous peoples for their traditional lands and resources (NCAI 2009).

Who Shall Treat?

Higher-level employees who are empowered with authority to make decisions need to be involved in key decisions around climate change. Delegation of authority to people with special expertise to make agreements in detailed matters remains important to success and speed of decisions. Often, getting

external brokers or stakeholders that stand between Tribes and agencies out of the way increases speed. At the same time, it is the people on the ground who start the process of making real decisions. They need to be fully educated in their country’s laws and policies and be provided with training and guided processes that involve them directly in participatory decision-making with indigenous peoples.

Strategy-Building

The third step is to identify strategies with specific tasks, time, and resource commitments. Through strategies, much important work can be accomplished, short of making laws or applying to the courts. The consultation process allows tribes and agencies to craft site-specific and issue-specific actions in tailoring strategies from the bottom up. Cooperative agreements or compacts and contracts are useful to identify roles, tasks, and responsible parties, along with budgets and funding sources. Multilateral strategies are not easy and all parties need expanded capacity and training to achieve success.

Working Transboundary

Tribal Transboundary Efforts

Examples of tribal initiation and management of transboundary consultation processes are significant for understanding the process. The Salish Gathering in the Northwest provides an example of tribal initiation of meetings to deal with the impact of climate change on both sides of the United States-Canadian border. States also play an important role in multilateral agreements for climate change that include Tribes. Many examples of state and tribal negotiations resulting in agreements can be found in enforcement and environmental regulations (NCSL 1995). In some States, like Oregon, conservation easements carry specific components enabling the holder to protect air and water values and provide for Tribes to obtain cultural conservation easements to protect cultural values (Olmstead 2009). Tribes have flexibility to use the tools of private property ownership themselves or cooperatively in combination with the land-into-trust process to achieve otherwise unattainable goals on private property. The Sinkyone Tribal Wilderness and the Arleco Creek project of the Lummi Tribe are examples of such interactions that extended the borders of influence from public to private holdings to protect a larger landscape. Cross-border Tribes like the Yaqui, Tohono Od’ham, Mohawk, and others at the Canadian and Mexican borders need to be involved in international consultation.

Jurigenesis, Traditional Ecological Knowledge, and Consultation

Cultural rights bleed into legal rights as Tribes enter into consultation with a set of important assumptions. From their position, indigenous rights are pre-existing and prior rights are bound in customary practice that forms its own body of common law and lands that they ceded in treaties or other agreements. It is asserted that all that was not specifically given up is retained as a pre-existing right. Prior

rights, such as water rights, demonstrate this position and many Tribes are concluding their water settlement agreements. Global warming impacts these rights along with the establishment of some parks, wild and protected areas, or programs like REDD that “inadequately values the concept of stewardship of the resource as practiced by indigenous peoples” (NCAI 2009). These protections and programs often change access to natural and cultural resources. Besides loss of ecosystem services, climate change has profound impacts on the cultural and religious practices of people around the world, and threatens traditional knowledge bases that contain innovative and cost-effective responses and practices. When adapted to functioning ecosystems on tribal or adjacent lands, traditional ecological knowledge defines special frameworks and practices that support the cultural, political, and economic life of the tribe (Stumpff 2006), so these impacts reverberate within and without boundaries. Climate change makes it all the more important “to recognize...the value of human endeavors such as the traditional practices of indigenous peoples that are sustainable, climate-resilient, time-tested, and in harmony with the natural environment” (NCAI 2009).

In the cultural context, stories and narratives act as analogues to precedent and provide the reasons and reinforcement for consensus about broad principles, while they justify or criticize certain deviations (Borrows 2002). They can be regarded as the authoritative basis for law and regulation by tribal members. They are guidance, more gyroscope than compass, and require specific internal interpretation to deal with dynamic environments and climate change. Borrows describes the process of applying cultural narratives to decisions and rule-making as *jurigenesis* (Borrows 2002).

Given a deepening cultural understanding, backed by consultation and meaningful environmental conflict resolution, agreements based on harmonizing interests between

distinctly different bodies of law and practice become possible. Table 1 suggests some mechanisms for harmonizing the process across different cultures and bodies of law.

The Rolling Carpet of Doom: Beyond Borders With Climate Change

Current scientific opinion points out that we are living in a time period within some sort of a tipping point range for climate change that leaves us teetering at the edge. Significant amounts of change already “in the pipeline” are likely to result in a 2 to 3 degree temperature increase (Hansen 2009). Reducing carbon emissions by 15-20% below levels of 2000 by 2020 is required (Union of Concerned Scientists 2008). Concurrently, we must work on solutions outside the usual range of Western science and indigenous knowledge, with ecological impacts that may be difficult to predict and others largely unknown. Because indigenous knowledge provides information about phenomena at the extremes and at the center, while offering alerts to problems in the ecosystem, it is key to agreement-making. The Quileute know something is wrong because there are no smelt eggs in time for Honoring Elders Day to make “stinky eggs,” so they know the smelt are out of balance often before scientists realize that this keystone species is faltering.

Tribes and indigenous peoples are asserting authorities and demanding voice. The impacts of climate change are already real and affecting their existence. New models are emerging like the agreement between the Confederated Salish and Kootenai Tribes and the U.S. Fish and Wildlife Service to co-manage the National Bison Range (fig. 1). Although it created controversy, the agreement was firmly established in law and regulatory agency processes as the Tribe asserted its essential right of self-determination. The

Table 1—Mechanisms for harmonizing multiple legal cultures.

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- Relationships over time establish trust.
 - Sui generis doctrine—Legal implications of cultural differences: uniqueness requires recognizing different categories, what is missing in common law requires that applied examples be drawn from appropriate legal, social and regulatory bodies in different cultures: open interpretations of wildlands protections and acceptance of cross-cultural concepts.
 - Negotiate
 - Expand each parties' notion of the others foundations in law, history and culture
 - Recognize the dynamic nature of common law
 - Creative use of conservation easements, cultural easements and other mechanisms provided through state law for private property
 - Recognize the current status of Federal and tribal authority as a basis for action
 - Utilize tools from existing law: self-governance compacts, self-determination contracts, annual funding agreements with Indian tribes under the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638) as amended and additional new and innovative types of agreements created by sharing international models.
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Figure 1—New models are emerging to assert rights of self-determination (photo: USFWS Online photo library).

Udall Institute's Environmental Conflict Resolution unit provided an effective process for environmental organizations and Tribes that revealed their common concerns. Under conditions of climate change, bison herds like these will need help and research from multiple sources on genetics, migration, and social behavior that breaks through old political and internal governmental protocols to better support their continued existence.

Why Agree?

Agreements are needed now for some of the known and likely impacts, and our ideas about boundaries and access may need to change if we are to preserve ecosystems. Animals are moving. Tulalip Tribal Natural Resources Director Terry Williams asks, "Will the Tulalip become 'People of the Mahi Mahi' instead of people of the salmon?" In addition to exotic species that thrive and out-compete natives in the changing environment, southern native species are turning up in Northwest waters. Animals are moving north. Alpine and high-mountain species may be most at risk, since they cannot go higher. Tribes hold indigenous knowledge about the habits and migration routes of many species and they can act with considerable flexibility. Should assisted migrations become necessary due to climate change, tribal partnerships can be critical operational partners, especially when agency

authorities to carry out such activities are lacking and there may even be an appearance, but not of substance, of violating the agency mission.

Forests may receive serious long-term impacts, since trees cannot adapt quickly by moving and old-growth is not easily replaced. If, in fact, large forested areas are lost, as predicted for Alaska due to increased fire or other climate-related impacts, species relocation may also come into play. Reliance on tribal partners for knowledge and practice will be important as boundaries of wildland protection will need to be extended. Where there are trust responsibilities to American Indians and Alaska Natives, agreements ensure that these are met, especially when large changes in access to species and places occur. If permafrost becomes grasslands, then replacement species that can migrate, e.g., buffalo, may be the only means of continuing subsistence rights. For trees and plants, root systems are impacted by heat in the soil and insect infestations increase. Herbaceous plants used for cultural and medicinal purposes may not be available. Already, basket makers in the Northwest note that the beargrass is getting smaller and smaller. Exotic species and disease are likely to proliferate. If a Tribe or agency puts significant resources towards reducing pine bark beetles, it will be important that compatible and effective controls are used on adjacent jurisdictions. Many climate change scenarios suggest possible actions in response to climate change (table 2).

Table 2—Initiate and innovate administrative harmonizing mechanisms.

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- Develop a cross-departmental cross-governmental approach, including budget, to deal with significant climate change problems (possible model is the fire budget) to reduce delays and increase effectiveness in protecting lands and wildlife.
 - Initiate institutional practices like talking circles to reduce conflict pre- and post- agreement and to assist in harmonizing interests and finding out whether or not a conflict really exists.
 - Identify areas of common interest like riparian restoration to build relationships before climate change reaches crisis proportions in its impacts.
 - Establish standards for problems like water quality that are exacerbated by climate change.
 - Look for ways to create, share and exchange green energy programs, infrastructure and use with Tribes developing local and regional models.
 - Engage tribes in multi-departmental agreements for solutions such as carbon offsets, habitat and wildland protection, and energy conservation.
 - Implement wider use of traditional indigenous knowledge as covered in Secretarial Order 3206 as a model (ESA) and the Convention on Biological Diversity.
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The Process of Consultation in the United States: Nuts and Bolts and DéTente

Consultation is not the same thing as consent, since consent implies absolute power to accept or refuse, though it often takes place in the long shadow of Treaties in the United States that were, at least legally, consensual in their nature. The plenary power of Congress affects Tribes while the trust doctrine applies to Federal agencies as they work with Tribes. In consultation, one party has the power to make the final decision; not as a right, but as a matter of law and power, and that is usually the Federal government (Deloria 1995). Yet, negotiation and compromise are required to achieve the support and general agreement that consultation implies and to find out what Tribes want. In some regions, as well as nationally, court cases set the tone for consultation. The Boldt decision on the implementation of tribal treaty rights colors all consultations in the Northwest and provides Tribes with protective parameters around rights to usual and accustomed sites for fishing, hunting, and gathering activities.

Today, Tribes hold significant resources, especially the rights to water resources, so they come to the table with resources of great importance to the ecosystem. The sea of change in relationships is underway as Tribes take the initiative to ask questions, call meetings, and create partnerships through Federal, state and private relations. Under conditions of climate change, the equity principle becomes self-evident; all have a stake when plants and animals move across boundaries, and water resources become unpredictable. Because of this, Tribes have an equal stake in process and outcome, and so “should play an equal part in deciding the shape of the system” (Deloria 1995 p.10).

The rebalancing of the consultation system is nowhere more evident than in Obama’s change, through Interior Secretary Salazar, from government-to-government language to that of nation-to-nation for consultation. It marks a time when

all nations should come together to mitigate global warming by protecting lands and resources.

- Take Action
- Build Trust
- Harmonize in the Face of Surprise
- The Power of Place Is in You

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The content of this paper reflects the views of the authors, who are responsible for the facts and accuracy of the information presented herein.
